SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1097

ODELL WALLER,
Petitioner,

against

RICE M. YOVELL, Superintendent of the State Penitentiary, Richmond,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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The American Civil Liberties Union is submitting a brief herein as *amicus curiae* because of its interest in the question of class discrimination raised in this case. The American Civil Liberties Union is an organization devoted to the furtherance and protection of the civil rights guaranteed by the Constitution of the United States. It has for many years supported individuals and groups whose basic rights were threatened. It believes that it is essential to the preservation of democracy in this country that no state shall be permitted to discriminate against any of its residents because of their economic status and that the Fourteenth Amendment to the United States

Constitution must be so interpreted. Believing that this case presents an issue of importance in this field, we beg leave to submit the following discussion:

In this case, petitioner, a Negro sharecropper, contends that he has been denied due process and equal protection of the laws because the Constitution and laws of Virginia are so designed and administered as to operate to exclude systematically from grand and petit jury service, and specifically from the grand and petit juries by which petitioner was indicted and convicted, a numerous and widespread class of citizens (to which class petitioner belongs) otherwise qualified who, because of the economic disabilities common to the members of their class, have been unable to and have not paid poll taxes as required by such Constitution and laws.

It is submitted that although the present Constitution and laws of Virginia do not specifically and in terms prescribe the payment of poll taxes as a qualification for grand and petit jury service, said Constitution and laws have not only been administered so as to make payment of poll taxes a qualification *in fact* for grand and petit jurors, but such Constitution and laws have been designed to permit them to be so administered.

This Court, in *Strauder* v. *West Virginia*, 100 U. S. 303, said, at pages 308-309:

> "The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. *The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.* Black-

> stone, in his Commentaries, says: 'The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter.' It is also guarded by statutory enactments intended to make impossible, what Mr. Bentham called 'packing juries'."

In *Smith* v. *Texas,* 311 U. S. 128, this Court said, page 130:

> *"It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.* For racial discrimination to result in the exclusion from jury service of otherwise qualified groups *not only violates our Constitution* and the laws enacted under it *but is at war with our basic concepts of a democratic society and a representative government."*

In *Pierre* v. *Louisiana,* 306 U. S. 354, this Court said, page 358:

> *"Indictment by Grand Jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races*—otherwise qualified to serve as jurors in a community—*are excluded as such from jury service."*

Thus, the extensions of the prohibitions of the Fourteenth Amendment against denial of equal protection of the laws, particularly in cases involving the exclusion of groups or classes from jury service, are not limited to denials because of race or color, but extend as well to denials based on politics, nativity, religion, economic status, or any other class discrimination.

In the instant case, the petitioner offered evidence that in Pittsylvania County, Virginia, wherein he was indicted and tried, the population of persons over twenty years of age was approximately 30,000 in 1940, and of this number only about 6,000 had paid poll taxes. Under these circumstances, "chance and accident" alone could hardly have brought about the listing for grand and petit jury service of no non-payers of poll taxes. See *Smith* v. *Texas,* 311 U. S. 128, *infra.* Nor can it be said that a jury from which so numerous and widespread a class of citizens is excluded can be "truly representative" of the community.

Petitioner is a Negro, and as such, a member of that economically, politically and otherwise disadvantaged group which the provisions of the Constitution and codes of Virginia for the payment of poll taxes, and making such payment a qualification for voting, were not only avowedly adopted for the purpose of disfranchising but for the unavowed purpose of barring the vast majority of the class from grand and petit jury service.

That it was the avowed purpose of the Constitutional Convention in Virginia which adopted the Constitution of 1902, to amend the suffrage clause of the then existing Constitution so as to deprive, *inter alia,* Negroes of the right to vote, is obvious from the following statement made in such Convention by Delegate Carter Glass:

> "The chief purpose of this Convention is to amend the suffrage clause of the existing Constitution. It does not require much prescience to foretell that the alterations which we shall make will not apply to 'all persons and classes without distinction'. We were sent here to make distinctions. We expect to make distinctions. We will make distinctions." (Proc. Const. Conv. p. 14)

> "I declared then (referring to the beginning of the convention and the debate on the oath) that no body of Virginia gentlemen could frame a constitution so obnoxious to my sense of right and morality that I would be willing to submit its fate to 146,000 ignorant negro voters (great applause) whose capacity for self-government we have been challenging for thirty years past." (idem. p. 3257)

That it was the unavowed purpose in adopting the provisions of the Constitution and codes of Virginia in prescribing the payment of poll taxes, to bar the vast majority of the class to which petitioner belongs from grand and petit jury service, or at least the present practical application of these provisions effects this end, is obvious from the allegations of fact, made by petitioner herein, to wit:

That, of the seven persons serving on the special grand jury by which petitioner was indicted, all had paid poll taxes, and all except one had paid such taxes for the years 1938 to 1940, both inclusive. Such one, though apparently in default for those years, had paid poll taxes for the year 1937 (Tr. 7, 8).

In *Smith* v. *Texas,* 311 U. S. 128, the Court said:

> "The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. *The Fourteenth Amendment requires that equal protection to all must be given—not merely promised.*
>
> "Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever. *But by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner, as practically to proscribe any group thought by the law's administrators to be undesirable.* And from the record

> before us the conclusion is inescapable that it is the latter application that has prevailed in Harris County. *Chance and accident alone could hardly have brought about the listing for grand jury service of so few Negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service.*"

This Court has recognized the fact that:

> "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Strauder* v. *West Virginia, supra,* p. 308. See also *Rawlins* v. *Georgia,* 207 U. S. 638, 640.

and that the nature of the community from which this case arises is such as to give reasonable basis for the assumption that prejudice against the class to which petitioner belongs and which because of its inability to pay poll taxes is, *in fact,* excluded from service on grand and petit juries, would exist in the minds of the members of the more fortunate economic class.

We maintain, therefore, that the prohibitions of the Fourteenth Amendment extend to the practice revealed herein whereby members of the economic class to which petitioner belongs are excluded from grand and petit jury service in Pittsylvania County, Virginia.

It is respectfully submitted, therefore, that the writ of certiorari prayed for be granted.

Respectfully submitted,

THURGOOD MARSHALL,
Attorney for American Civil Liberties Union,
Amicus Curiae.